Committee on Families, Children and Seniors
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Brooke Tucker, Staff Attorney
ACLU of Michigan
btucker@aclumich.org

Good Morning,

My name is Brooke Tucker and I am a staff attorney at the ACLU of Michigan. On behalf of that organization I am here to oppose House Bills 4188 , 4189, 4190 - bills which will allow a multitude of foster and adoption agencies in this state to place their own religious beliefs above the welfare and best interests of the children that have been placed in their care by the state. Moreover, it allows these agencies to do so with public money.

These bills claim that their purpose is to protect the agencies' free exercise of religion while simultaneously not limiting or denying any person's right to adopt a child or participate in foster care. Yet, this bill does not protect the agencies' free exercise of religion but it does limit a person's right to adopt a child or participate in foster care in Michigan. I will address each point in turn.

The Free Exercise clause constrains the government from taking action to inhibit an individual from exercising their religion unless such action is narrowly tailored to serve a compelling government interest. However, the Free Exercise clause does not mean that the government must take affirmative action to assist someone to exercise their religion as they see fit. For example, as exemplified in the seminal Supreme Court case Wisconsin v. Yoder, if an individual's religion requires their children to leave school and start farm work at age 14, Free Exercise does not allow the government punish that individual for violating compulsory school attendance laws that would ordinarily require the child to continue with schooling until age 18. Free exercise does not require the government in that case, however, to provide the child or his family with the farm tools needed to perform that work.

Religious freedom means the freedom to exercise your individual religious beliefs. It does not mean the ability to impose your beliefs on others nor requiring the state to finance your discrimination against those same taxpayers who do not share your beliefs.

In fact the Free Exercise clause was created precisely because of "historical instances of religious persecution and intolerance."
We are not a state or a country that tolerates, let alone legalizes, discrimination. In addition to our constitution's equal protection mandates that states all people are entitled to equal protection under the law, there are a multitude of statutes that ensure people can live life free of discrimination. Statutes to ensure people cannot be discriminated in housing, employment, or in public accommodations. These statutes have existed for decades.

And during that time, day in and day out, people around this state have continued to exercise their religious beliefs in ways that don't discriminate against, or otherwise interfere with, the rights of others. In the area of adoption, private faith-based agencies have long been permitted use their own, or other private funds, to facilitate the adoptions of children who are not in state custody. If the agencies' religious beliefs require, such agencies can choose to only work with people who share their faith.

But that is not what's involved with HB 4188, 4189 and 4190. These bills go against our national value and law of non-discrimination by legalizing discrimination. Specifically, these bills allow private faith-based agencies to use taxpayer money -- public money - - to facilitate the adoptions of children who are wards of the state AND turn away people who do not share their religious beliefs. This is both unconstitutional and illegal under Michigan's Elliot Larsen civil rights law. This is so because private agencies that use taxpayer money to facilitate the placement of children in state custody are state actors for that purpose. And state actors, unlike purely private entities, have heightened responsibilities – they must comply with the constitution. And that means, they are not allowed to discriminate on the basis of religion. There is no possibility of legal debate on this point. Just as a government agency could not refuse to hire someone because of their religion or refuse to provide services to someone because of their religion, neither can a private agency when it is a state actor.

Now to address point 2 – that this bill does limit the ability of people to participate in the foster care system or adopt. And more importantly, the ability of children to find a timely suitable placement. Emphasis on the word timely.

The beginning of House Bill 4188 states "An act to provide for the protection of children . . ." And, indeed it is the protection of the children in Michigan's foster care and adoption system that should be paramount. According to the State of Michigan's website, there are approximately 13,000 children in the state foster care system at any given time. 13,000. This immense number indicates that there are already an insufficient number of suitable families to provide the loving and supportive homes that these children deserve. DHS has an extraordinary task in front of it in protecting these children and has implemented multiple regulations to ensure these children are safe and placed according to their best interests.

Yet, under section 14(f)(1) of House Bill 4188, if DHS refers a prospective parent to a particular agency, that agency may refuse to serve the prospective parent if that service would conflict with any of the agency's written religious beliefs. This could allow the agency to refuse service because the prospective parent adheres to a different denomination of Christianity than the agency, or a different faith entirely. As well as refusing to place a child with a parent who has previously been divorced, or who is currently single. In Section 14(f)(3), HB acknowledges that a denial on any of these grounds has no bearing on whether placing a child with the parent who has been turned away is in the child's best interest. Refusing to serve a parent whose home is in the best interests of the child is nothing short of blatant, unlawful discrimination.

When a suitable person or family wants to adopt and is referred to an agency that turns them away for any number of religiously motivated reasons that have nothing to do with their parental fitness, this stalls the adoption process which mean children wait longer to be placed in homes.

Moreover, the largest adoption placement agency in the state, Bethany Christian, is faith-based. These bills will allow Bethany to turn away a large number of suitable prospective parents, solely on religious grounds. Although the parents turned away will have been the victims of unlawful discrimination, the most harmful effects will be on the children placed by the state with Bethany Christian who now have to wait indefinitely for a prospective parent or family that matches Bethany's religious criteria.

And, the bill's effect on children is especially troubling. The state does not handle any adoptions. So, if DHS has a Jewish child in custody that has been fostered and is now moving into the adoption process, the state is at the mercy of the private agencies to handle the adoption. If 1, 2, or 60 faith-based agencies can refuse to place the child simply because of the child's faith, then it is the child who must continue to languish in state custody for no other reason than he or she does not have the proper religion according to the agency.

Because courts in this state have already determined that private agencies are state actors when taking state money to place children in state custody in homes, any policy of the agency in this regard must pass constitutional muster, including the Establishment Clause. While the government cannot inhibit an individual's free exercise of religion, it also cannot establish religion through its policies. The U.S. Supreme Court set forth a three-part test to determine whether a particular policy violates the establishment clause. Failure to meet any one of the three parts automatically means that the policy violates the establishment clause.

The first is – Does the bill have a secular purpose. Here, the answer is clearly no. The sole purpose of this bill is to allow agencies taking state money to discriminate

on the basis of religion rather than use the secular standard of acting in the best interests of the child.

The second part of the test asks whether the primary effect of the bill is to either advance religion or inhibit religion. Here the bill does both. It allows state actors to advance their own religious beliefs at the expense of what is best for the children. And it allows the state actors to inhibit the religious beliefs of others by punishing prospective parents with different beliefs by refusing to serve them.

The final part of the test is whether the bill fosters an excessive government entanglement with religion. Clearly that is happening here. Agencies paid by the state to do the state's work and licensed by the state are being permitted to use their religious beliefs to deny the placements of children in state custody.

As I mentioned before, satisfying any of these three criteria means that the bill violates the Establishment Clause. Here, there is no question that this bill violates the Establishment Clause because all three criteria are met.

In sum, just as the state cannot refuse to contract with a private faith-based agency for child placements simply because of the agency's religious affiliation, an agency that uses state money to place children in state custody, and as such acts as the state for that purpose, cannot refuse to work with a prospective parent simply because of that individual's religious affiliation. This is unconstitutional – but this is exactly what these bills allow agencies to do. For that reason, we strongly oppose House Bills 4188, 4189, and 4190 and stand ready to challenge them should they become law.